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LEGAL UPDATE

IN THIS ISSUE:

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REFORM OF THE JUDICIAL SYSTEM

Benefiting of logistical support from the European Union through its specialist advisors, being subject to debate by professional associations, non-governmental organisations, but especially by the Romanian specialists in the legal field, after almost a year since their initiation by the Government, the entire legislative package on the Romanian judicial system has been published in the Official Gazette. We refer to the Law on judicial organization no. 304/2004, the Law on the statute of magistrates (Official Gazette No. 576 of June 29th, 2004), as well as the Law on the Superior Council of the Magistracy (Official Gazette No. 599 as of July 2nd, 2004)[1].

The common feature of these three normative acts is the reform of the judicial system having the aim of a credible justice to be brought by professional magistrates whose statute would ensure an independent and impartial intervention. We shall signal hereinafter the novelties brought by each of these organic laws whose provisions shall enter into force in 90 days from their publication in the Official Gazette.

The Law on judicial organization

Having the character of an organic law in the field of legal organisation in Romania, the law expressly reanalysed and detailed a series of *fundamental principles of the Romanian Constitution*, including those referring to each person's right to a fair trial and to the hearing within a reasonable time before an impartial and independent court, established by law and the right of the Romanian citizens belonging to national minorities to use their mother tongue before judicial courts.

At the same time the new Law on judicial organization has also registered within its contents all the dispositions referring to the High Court of Cassation and Justice which shall no longer have a separate organic law.

A novelty within the legal organization from post-revolutionary Romania is the creation of *specialised courts,* such as: those for minors and family matters; for employment and social security matters; commercial matters and fiscal-administrative matters. They are set to effectively function starting with January 1st, 2008, the aim of their creation being of course a "professionalization" of magistrates which should lead to issuing some solid grounded and legal decisions by the specialised magistrates familiarised with the respective fields, but also to increase celerity of court proceedings and unburden the ordinary courts of the settlement of certain types of cases. Within today District courts, the civil and penal chambers shall be maintained, as well as the maritime and fluvial chambers where these function, and until January 1st, 2008 specialised chambers shall function in the fields where specialised courts are set to be created.

Another novelty measure is that of establishing the rule according to which the managing activities of courts at all levels

[1] 1) That has been described for systematization purposes in this issue, generally addressing the legal enactments, published in June 2004.

shall no longer be exercised, as until the present by a sole person – the president of the court – but by a *managing body* which shall mandatorily include: the president, the vice-presidents, the presidents of chambers as well as 1-2 judges chosen by the general assembly of judges.

As for the judge panels *the principle of collegiality* both for the judging in first instance (2 judges), as well as for the judging in the intermediate appeal and final appeal (3 judges). This principle, which shall function starting with January 1st, 2005, shall be preferred by assuring the possibility of a better decision owing to the exchange of ideas and professional experience, the chance of a real independence of the judges guaranteed by the anonymity of the decision and the possibility to train young judges by joining them in the panel comprising experienced judges. Nevertheless, a series of cases shall still be settled by a sole judge (e.g.: for injunctions and the summons of payment, but also of the garnishment proceedings, possessory actions and claims against sanctioning misdemeanours minutes).

Moreover, *the rule of composing the judge panels at the beginning of the judicial year,* by ensuring their continuity and *the repartition of the cases* to these panels shall be done *at random, by means of an electronic system.*

The legal novelties related to the *Public Prosecutors* refer to: placing the judicial police under the guidance and supervision of prosecutors; the express establishment of the prosecutor's active role in searching the truth and grouping the provisions regarding to the National Anti-Corruption Prosecutor's Office within the same law on judicial organization. Prosecutor's offices attached to specialised courts shall also be established.

An essential measure for the possibility of proper and efficient administration of the budgets of each court consists on entitling the courts of appeal to draw up the *annual budget* projects for the courts under their jurisdiction with the authorisation of the Superior Council of the Magistracy, but also the creation, starting with January 1st, 2005, of the position of *economical manager*, who shall have economical and financial administration powers, thus relieving the judicial staff of such tasks.

Law on the statute of magistrates

Reflecting the fundamental principles that refer to the independence of justice, as approved by the UN General Meeting of in 1985 and the Council of Europe Recommendation no. (94) as of October 13th, 1994 on the independence, efficiency and role of the judge, the new law regarding the statute of magistrate establishes their obligation, to ensure the supremacy of the law during their entire activity, to respect the persons' rights and liberties, as well as their equality before the law and to assure a non-discriminating treatment to all the participants to the legal proceedings, irrespective of their capacity.

The novelties regarding incompatibilities and interdictions imposed on the Romanian magistrate refer to : express interdiction to carry out arbitration activities in civil,

commercial cases or matters of another nature; of the instituting a derogation from the impossibility of a magistrate to become a shareholder or associate in a company by recognising their rights resulted from the mass privatisation programme; the express indication of the magistrates' interdiction to comment or justify in mass-media or in audiovisual programmes the decisions and solutions issued in the cases settled by them.

Recruitment of magistrates shall be done exclusively by contest examination, by the same National Institute for Magistrates, the essential difference consisting in the fact that the entire activity of the National Institute for Magistrates shall be supervised and coordinated not by the Ministry of Justice, as until the present moment, but by the Superior Council for Magistrates. The only exception from the rule of examination is accepted for the university professors of the accredited superior legal education, as well as for persons that held the position of magistrate or assistant magistrate in the High Court of Cassation and Justice for at least 5 years. Trainee magistrates shall no longer be appointed by the Ministry of Justice, but still by the Superior Council of the Magistracy. The training period for magistrates has increased from 2 to 3 years, and the obligation of the graduates of the National Institute for Magistrates to hold a position of judge or prosecutor has been established for 6 years, otherwise they shall be compelled to return the received indemnizations received and the school tuition.

The requirements regarding magistrates' *professional formation and periodical evaluation* have been emphasized, by clearly establishing the criteria according to which the magistrates' annual evaluation shall be done by commissions created by the Superior Council of the Magistracy's decisions that is to issue specific regulations. Also, the evolution of the magistrates' career that is under the authority of the Superior Council of the Magistracy shall be followed through personal records and a data base at a national level.

The conditions for the magistrates' career advancement promotion in positions of execution (to a higher court) or the appointment in managing positions (for 5 years without the possibility of being reinvested) have been amended, by establishing new requirements for length of service in magistracy and especially rules related to the transparency of the procedure and supervision by the Superior Council of the Magistracy.

By repeating the provisions established in the Constitution with respect to the patrimonial liability of the state for the losses caused by judicial errors, the conditions in which *the liability of the magistrates* who exercised their position in mala fide or serious negligence have been detailed. Thus the right of the concerned person to compensation of the patrimonial losses caused by judicial errors in other cases than the criminal ones has been established and this right may be exercised only if the criminal or disciplinary liability, as the case may be, of the magistrate for an act carried out during the settlement of the case, has been previously established by a final decision and if this act is capable to

determine a judicial error. The action for damages pertaining to the loss caused by judicial error shall be filed against the State, and the State, in its turn, may, under the conditions required by the law, sue the magistrate who has generated the judicial error that caused losses.

Moreover *the right of each person to inform the Superior Council of the Magistracy, directly or by the heads of the court or of the prosecutor's offices*, in relation to the activity and the improper attitude of a magistrate, his infringement of professional duties or his disciplinary abatements.

The Law on the Superior Council of the Magistracy

Some of the most important measures to the purpose of reforming justice in Romania have been adopted by reorganizing the status of the Superior Council of the Magistracy, based on the constitutional provisions, by succeeding in consolidating its position as justice independence guarantor. Thus, the majority of the powers the Minister of Justice holds in relation to the appointment procedure (the assent), professional evaluation, advancement, transfer, delegation, professional training, authorisation for magistrates arrest, but also those powers related to the organisation and operation of the courts and the prosecutor's offices have been transferred towards the independent authority of the Superior Council of the Magistracy.

As it has been anticipated by the Constitution revision of 2003, the Superior Council of the Magistracy shall carry out its activity starting with January 2005, when the new Council is to be appointed, in a new formula which shall include 19 members, of two categories: (i) *rightful members* – the President of the High Court of Cassation, the General Prosecutor of the prosecutor's office attached to the High Court of Cassation and the Minister of Justice and (ii) *elected members,* for a 6 years mandate of which 9 judges and 5 prosecutors that are to represent, for the first time, all the levels of the judicial and military courts, forming "the section for judges", and respectively "the section for prosecutors", but also 2 representatives of the civil society.

The judges and prosecutors that are to represent each of these categories of magistrates shall be elected by the general assembly of magistrates from among the irremovable magistrates with a 6 year length of service and finally validated by the Senate. The civil society representatives shall be elected by the Senate from among the candidates proposed by the professional organizations of jurists, the accredited law faculties' councils, the associations and foundations that have as a sole object of activity the protection of the human rights, the trade-union and employers' confederations that are representative at a national level.

The Superior Council of the Magistracy's activity shall take place in its general assembly or within its sections. With respect to disciplinary matters, the details referring to the initiator of a disciplinary action, the term in which it may be initiated, prior investigation procedure, but also the jurisdiction of each of the sections to rule

over the identified disciplinary abatements has been set. The decisions issued by sections may be challenged with final appeal before the 9 judges panel of the High Court of Cassation and Justice.

AMENDMENT OF THE PROCEDURES BEFORE THE CONSTITUTIONAL COURT

Required from the entry into force, in October 2003, of the Constitution's revised provisions, the amendment of the Constitutional Court organic law No. 47/1992 has been applied by Law No. 232/2004 published in the Official Gazette No. 502 of June 3rd, 2004 which entered into force in three days from its publication.

The amendments refer mainly to the description of the detailed procedure after which the new competences recognized to the Constitutional Court in its capacity of guarantor of the Constitution's supremacy shall be exercised, as we shall underline them hereinafter.

Unconstitutionality claims

The procedure with the largest application before the Constitutional Court is, obviously, the one referring to the possibility of any person who considers that the provisions of a law or ordinance in force infringes the provisions or principles of the Constitution to raise the claim of unconstitutionality of the respective provisions before judicial courts.

The novelty consists in extending this possibility by authorising the use of this claim – by the parties, the court or the prosecutor – both before the judicial courts, *and before those of commercial arbitration*, in any phase of the litigation irrespective of its subject matter. At the same time, it has been established that the *prosecutor's participation to the judgement* by the Constitutional Court of the unconstitutionality claim is mandatory.

Another novelty related to this exception lies in the possibility of raising it also *directly before the Constitutional Court by the Ombudsman*, who in its turn is notified by the citizens who consider that their rights and freedoms are impaired by an unconstitutional law or ordinance.

Conflicts between public authorities

One of the new prerogatives recognized to the Constitutional Court is that regarding the settling of *the legal conflicts of constitutional nature between public authorities*, upon the request of the President of Romania, of one of the presidents of the two Parliamentary Chambers, of the Prime-Minister or of the president of the Superior Council of the Magistracy. The aim is, of course, to ensure in practice the separation and balance of powers.

Effects of the Constitutional Court's decisions

By taking over the constitutional provisions meant to ensure a better compliance in practice with the Constitutional Court's decisions issued by the, the new organic law of the Court also provides that the provisions of laws and ordinances in force

established as being unconstitutional *cease their legal effects within 45 days from the publication of the decision of the Constitutional Court* in the Official Gazette , if, within this interval, the Parliament or the Government, as the case may be, does not ensure the conformity of the unconstitutional provisions with the dispositions of the Constitution. Throughout this period, the dispositions ascertained as being unconstitutional *are automatically suspended.*

PRIVATE HEALTH INSURANCES

By the Law on Health Insurances No. 212/2004, published within the Official Gazette No. 505 of June 4th, 2004 the general legal framework for one of the most wide spread practiced type of general insurance has been created, provisions long awaited by the insurers together with those related to the regulation of private pensions.

Regarded as a solid alternative to the public health insurance system, almost in all countries of the European Union and especially in the U.S.A., private health insurances are practiced on a large scale, in different types, as they are to ensure the development of health systems, of private clinics and not last a better trained medical personnel due to the competition specific to private services.

Law No. 212/2004 expressly regulates the possibility of the insurers from Romania to conclude private health insurance agreements which may offer to the interested insured the possibility to benefit from: (i) packages of medical services *supplementary* to those compulsorily offered by the public system and covered by the sole national fund for public health insurance based on the Government Emergency Ordinance No. 150/2002; (ii) the possibility to cover by virtue of a sole insurance premium, both "the basic services package" offered by the public system, and the package of supplementary medical services, upon the system referred to as *substitutive*; (iii) the opportunity that upon private insurances of a *complementary* type to cover the total or partial payment of the services that have been partially excluded from the public system or the co-payments for the public health system.

Nevertheless, the general framework is established through dispositions of reference to the general legal framework applicable to the insurance field, both with regards to the insurance policies, and especially to the authorization of the insurers for their practice. Moreover, due to the fact that private health insurance companies are authorized to establish medical centres, hospitals, drug stores and other medical services units to provide the said private medical services, the framework law should be completed with a large number of secondary normative acts, related especially to the health field.

By the entrance into force of Law no. 212/2004 in September, this year, the private health insurances shall be encouraged, not as much through their regulation, since many insurers used to practice this type of general insurance under different forms, but under a fiscal aspect. Thus considering that the Fiscal Code provided on a general basis employers' possibility to deem as a deductible expenses the insurance premiums paid in the name of the employees to private health insurances

"*within the limits established in accordance with the law*", as well as to natural persons the same possibility for the taxable incomes, the new Law no. 212/2004 allows the entire fiscal deductibility of expenses made with private health insurances.

REAL ESTATE PUBLICITY

Aiming at creating a sole unique cadastral system, in order for the specific information it offers to be available for all interested persons, GEO No. 41/2004 has brought significant amendments to Law No. 7/1996 on the cadastre and the real estate publicity.

In brief, the amendments refer mainly to the administrative organisation of the cadastre system, thus a distinct administrative authority to take over and exercise the attributions in the field of the cadastre and the real estate publicity being established (the National Authority of Cadastre and Real Estate Publicity – "NACREP").

At the level of county offices subordinated to NACREP, we note that the real estate activity shall fall under the responsibility of a registration officer (assimilated to a legal advisor). His role and attributions regarding verification of the legal documents submitted for registration with the Land Book have been simplified in comparison to the attributions of Land Book judges, as it was previously regulated.

As an effect of the express provisions of GEO No. 41/2004, we should underline that any registration with the Land Book regarding the ownership right or other real rights over an immovable asset. This way, the requirement of a notarized document in case of registrations with the Land Book is extended to an institution or transfer of real rights over all real estates, and not only in respect of lands.

The above amendment is important under the formal-juridical perspective as it unifies and clarifies the legal regime of registrations with the Land Book for all real estates, with no exemptions, the practice developed on the matter being followed, according to which even the registrations regarding buildings were disposed, in their large majority, based on notarized documents.

CAPITAL MARKETS

After two years of public debates on the proposed consolidated regulation on the capital markets, the Romanian Parliament has passed on June 28, 2004 the new law on the capital markets. The law has been published in the Official Gazette no. 571 of June 29, 2004 and shall enter into force within 30 days as from its publication.

The **Capital Markets** Division within Popovici & Asociatii is preparing a special edition of the legal update on this matter, which shall be subsequently available.